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IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 1004

A. C. SUHREN, LYDIA COOK SUHREN, ET AL., Petitioners

versus

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit.

RESPONSE OF PETITIONERS TO BRIEF FOR THE UNITED STATES IN OPPOSITION.

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LANDOWNERS' RESPONSE

It would be a great miscarriage of justice to over 2000 property owners for certiorari to be denied upon the assertion[1] on the part of government that this case is controlled by *Money v. Wood*, 152 Miss. 17, 188 So. 357, or *Xidis v. City of Gulfport*, 221 Miss. 79, 72 So. 2d 153.

Money held that Section 81[2] of the Mississippi Con-

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[1] In its opinion the Fifth Circuit quoted a short excerpt from *Parks v. Simpson*, 242 Miss. 894, 137 So. 2d 136. In that excerpt *Money* and *Xidis* were cited. There is no other reference to those cases in the opinion in chief or on rehearing.

[2] Section 91 The Legislature shall never authorizes the permanent obstruction of any of the navigable waters of the state, but may pro-

(Continued)

stitution of 189 was adopted ". . . for the purpose of aligning this state with that line of authorities which hold that the state cannot convey in fee such rights to private owners for private purposes."

Thirty-nine years after *Money*, all nine justices of the Supreme Court of Mississippi held that Section 81 of the Mississippi Constitution of 1890 had ". . . nothing to do with the alienation of mud flats and waters not suitable for navigation in fact, or the sale of submerged lands." *Treuting v. Park Commission*, 199 So. 2d 627. Distinguishing *Money v. Wood, supra*, the Court in *Treuting* said:

> (Money) held that a patent from the land commissioner to private persons of submerged lands around Deer Island, for the purpose of erecting a hotel on an artificial island, was void, because it deprived the owners of the west end of the island of their riparian and littoral rights, and was a sale to a person for purely private business. The indication therein that section 81 of the Constitution prohibited the sale of submerged land was **unnecessary to decision of that case.** In short, **the trust character of the state's title and ownership is not constitutional but common-law doctrine.** (emphasis added)

The subject case deals with mud flats and shallow water, and has nothing whatever to do with navigation. Therefore, *Money* is clearly not applicable.

The same can be said of *Xidis*. The South margin of Xidis' property was not the Mississippi Sound, but was

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vide for the removal of such obstructions as now exist, whenever the public welfare demands. This section shall not prevent the construction, under proper authority, of draw bridges for railroads, or other roads, nor the construction of booms and chutes for logs in such manner as to prevent the safe passage of vessels, or logs, under regulations to be provided by law.

the North margin of U. S. Highway 90. While he did not own to the water's edge, he claimed that the harbor planned by the City of Gulfport would interfere with rights which he had enjoyed ". . . such as access to the water, boating, bathing, fishing, crabbing, floundering, shrimping, and the view of the sea and natural breezes from the sea. . . ." The court assumed without deciding that he had those rights, but went on to hold that the ". . . improvements here complained of were improvements for the further development of the Port of Gulfport and in aid of navigation, and do not contravene Section 81 of the Mississippi Constitution. . . ." Therefore, the right of Xidis to engage in boating or to bathe, fish, crab, flounder or shrimp, had to yield to the City's paramount right to improve navigation by expanding its harbor.

Finally, we think it is extremely significant that in its response the government has failed to come to grips with *Treuting* and *Moore v. Kuljis*, 207 So. 2d 604, both of which were discussed in our petition for writ of certiorari. While those decisions anti-date the decision of the Fifth Circuit in the subject litigation, they are the most recent expressions of the Supreme Court of Mississippi on the subject of submerged tide lands and artificial accretions. They represent the considered judgment of all of the participating justices of that court.[3]

The Fifth Circuit, which is enjoined by the decisions of this court to follow the property law of the various

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[3] We touched on this subject in our petition, but the full significance of that participation is not apparent. The Supreme Court of Mississippi consists of nine justices, which sits in panels of five with either the Chief Justice or the next in seniority, the presiding justice moderating. In an important case, all nine justices may be called on to express their opinion or concurrence. All justices concurred in *Treuting;* eight concurred in the result in *Moore.* Presiding Justice Gillespie took no part in the latter.

states, has chosen to lead rather than follow. Its course through the property law of Mississippi concerning the shallow waters of the Mississippi Sound was clearly charted by *Guice*, *Treuting* and *Moore*. The Fifth Circuit overruled *Guice*, not because of *Money* or *Xidis*, but because the Fifth Circuit did not agree with the Supreme Court of Mississippi. Now the Solicitor General cites cases to this court dealing with navigation which have no bearing on the shallow waters of the Sound. This is a prime example of ". . . the discordant element of a substantial right . . ." about which this court spoke in *Edward Hines Yellow Pine Trustees v. Martin*, 268 U.S. 458, 463.

CONCLUSION

For the foregoing reasons, Petitioners suggest that a writ of certiorari should be granted.

Respectfully submitted,

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CERTIFICATE

I, George E. Morse, one of counsel for the petitioners in the foregoing brief, hereby certify that three true copies of the said Response were this day mailed, postage prepaid, to Hon. Erwin N. Griswold, Solicitor General, Washington, D. C.

This _____day of February, 1970.